

STATE OF MICHIGAN
COURT OF APPEALS

JAMES P. O'BOYLE, Next Friend of JAMES P.
O'BOYLE II, JENELLE O'BOYLE, JEFFE
O'BOYLE, Minors, and JACALYN O'BOYLE,

UNPUBLISHED
August 13, 1999

Plaintiffs-Appellants,

and

ATTORNEY GENERAL and DEPARTMENT OF
COMMUNITY HEALTH,

Intervenors,

v

LITTLE LEAGUE BASEBALL, INC., PORT
HURON AMERICAN LITTLE LEAGUE, INC.,
and RAWLINGS SPORTING GOODS INC.,

No. 207230
St. Clair Circuit Court
LC No. 94-001266 NO

Defendants-Appellees.

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action regarding their product liability claim, which was entered following a jury trial. They also challenge an order granting summary disposition regarding their claim of negligent infliction of emotional distress. We affirm.

This case arises out of an injury suffered by James P. O'Boyle II, who was hit in the head with a baseball during a Little League baseball game. Defendant Rawlings Sporting Goods, Inc. manufactured the baseball. Plaintiffs brought a product liability action alleging that the baseball was defectively designed in that it was too hard, that defendants were aware of the ball's potential for causing serious head injuries, and that defendants were negligent in failing to warn and in permitting the use of this type

of baseball during Little League games. Plaintiffs also brought a claim of negligent infliction of emotional distress. The trial court granted summary disposition in favor of defendants with respect to the negligent infliction of emotional distress claim and denied the motion with respect to the product liability claim. Following a jury trial, the jury rendered a verdict of no cause of action in favor of defendants regarding the product liability claim.

Plaintiffs first argue that the trial court erred in granting summary disposition regarding their negligent infliction of emotional distress claim. Michigan recognizes a cause of action based on negligence where a parent or close family member who witnesses the negligent infliction of injury to his or her child or close family member suffers emotional distress as a consequence. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986). Four elements must be satisfied in order to recover: (1) the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband, or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock fairly contemporaneous with the accident. *Id.* at 81.

Plaintiffs failed to provide sufficient evidence to satisfy all the above elements. First, they did not allege or provide any affidavits, depositions, or other documentary evidence to show that they suffered any physical harm based on witnessing James II being hit by a baseball. Second, the injury that he suffered as a result of being hit was not “of a nature to cause severe mental disturbance” to plaintiffs. *Gustafson v Faris*, 67 Mich App 363, 368; 241 NW2d 208 (1976). In *Gustafson, id.*, this Court noted that “[i]t is clear that the injury threatened or inflicted upon the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff, and that the shock must result in actual physical harm” Here, James II was struck in the head, after which he walked a few steps, sat down on the ground, and then got up and resumed playing ball. The serious nature of his injury was not revealed until a day or two later. Although seeing a child or sibling being struck in the head with a baseball would be alarming, we conclude that the facts here do not reveal the type of injury that causes a severe mental disturbance. See *Pate v Children’s Hosp of Michigan*, 158 Mich App 120; 404 NW2d 632 (1986). Third, although plaintiffs alleged in their complaint and averred in their brief opposing summary disposition that James P. O’Boyle, Jennelle O’Boyle, and Jeffe O’Boyle directly viewed the accident, and that Jacalyn O’Boyle viewed it “contemporaneously,” they did not provide any affidavits, depositions, or other documentary evidence to support these allegations. Plaintiffs could not rest on mere allegations or denials in the pleadings, but had to present evidence setting forth specific facts to show that there was a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition was therefore appropriate.

Plaintiffs next argue that the trial court erred in limiting the testimony of their expert witness. The record reveals that defendant Rawlings Sporting Goods took the deposition testimony of plaintiffs’ expert six days before the first day of trial. At the deposition, the expert testified that he was initially engaged to do a full analysis of the Rawlings baseball, but that his assignment changed to deal instead with the problem of impact. Defendant specifically asked the expert whether he was prepared to testify that defendant’s baseball was defective from a products liability standpoint, to which the expert

responded, “No.”¹ Anticipating that plaintiffs would attempt nevertheless to introduce testimony regarding defects through the expert, defendants moved to limit the expert’s testimony to the opinions he gave at the deposition. Plaintiffs agreed that the expert was prepared to testify that the baseball was unreasonably dangerous. Despite plaintiffs’ argument that there were previously filed affidavits in which the expert did have an opinion that the baseball was unreasonably dangerous, the trial court granted the motion, citing defendants’ right to rely on the deposition testimony and the lack of notice.

Defendant Rawlings directly asked the expert about the subject matter and substance of his expected testimony at the deposition. The expert stated he was not going to testify regarding any defect in defendant’s product. We conclude that plaintiffs had a duty to inform defendants that they intended to have the expert testify regarding a defect, thus expanding the subject matter and substance of his testimony before calling the expert at trial. Although plaintiffs argue that defendants had notice of plaintiffs’ intent to have the expert testify regarding the defect based on affidavits that were attached to plaintiffs’ briefs opposing summary disposition, we do not find this argument persuasive. These affidavits were filed over a year before trial, and in any event, at the deposition the expert specifically stated that he was not going to testify that defendant’s product was defective. The purpose of taking a discovery deposition of an expert witness is to determine the subject matter and substance of the expert’s testimony. We believe defendants were justified in relying on what the expert told them a week before trial and under oath as opposed to what was stated in a year-old affidavit that was submitted in conjunction with summary disposition.

We conclude that the trial court had discretion to fashion a remedy. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997); see also *Cummings v Wayne Co*, 210 Mich App 249, 251-252; 533 NW2d 13 (1995). The question then is whether the trial court’s remedy of limiting the expert’s testimony was appropriate. In *Price v Long Realty, Inc*, 199 Mich App 461, 468-469; 502 NW2d 337 (1993), this Court concluded that the trial court had not abused its discretion in prohibiting the defendant’s expert witness from testifying regarding the value of the property in dispute. This Court noted:

[t]he record indicates that the defendant revealed in its answers to the plaintiffs’ interrogatories that [the expert] would be offered as an expert to testify about the standard of care of realtors, but did not disclose that he would testify about the value of the plaintiffs’ real estate. [*Id.* at 469, citing MCR 2.302(E)(1)(a)(ii).]

Here, as in *Price*, the trial court did not exclude the expert witness from testifying, but merely excluded the expert from testifying regarding matters about which defendants did not have notice that he would testify. Accordingly, we conclude that the trial court did not abuse its discretion in limiting the expert’s testimony. *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 251; 477 NW2d 133 (1991).

Finally, plaintiffs argue that the trial court erred in refusing to admit a National Operating Committee for Standards in Athletic Equipment (NOCSAE) standard as evidence. The admission of nongovernmental standards in a products liability action is governed by MCL 600.2946(1); MSA 27A.2946(1), which provides:

It shall be admissible as evidence in a product liability action that the production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

No evidence was presented to show that the NOCSAE standard was a generally recognized prevailing industry standard regarding the production of baseballs. Testimony indicated that only two out of approximately nineteen ball manufacturers relied on and complied with the NOCSAE standard in manufacturing baseballs. While there was evidence that most manufacturers are capable and do in fact produce baseballs that would comply with the standard, that evidence does not satisfy the foundational element that the standard be generally accepted and prevailing. Because plaintiffs did not provide evidence that the standard was generally recognized and prevailing, the trial court did not abuse its discretion in denying its admission. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996).

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

¹ More specifically, plaintiffs' expert, Ralph Barnett, testified at his deposition that he had no criticisms of defendant Rawlings in marketing the baseball to customers such as Little League who elect to use those balls. Dr. Barnett stated that he was not of the belief that the baseball was defective from a product liability standpoint, nor was he of the belief that the baseball should have been designed or manufactured in a different manner. Dr. Barnett went on to testify that the marketplace should dictate whether a softer ball should be used and that such a marketplace question is outside the area of the manufacturers. According to Dr. Barnett, he was retained by plaintiffs to evaluate the baseball, but had no criticisms directed toward Rawlings.